(8)

No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, et al.,

Petitioners,

v.

CHERYL R. CHURCHILL, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS

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59 pp

QUESTIONS PRESENTED

1. Does a public employer who terminates an employee motivated by reports of speech denoting criticism of the employer's policies which reports, the employer has no reason to disbelieve, refer to protected speech on matters of public concern, violate the First Amendment if the employer claims he didn't know the exact content of the speech and thereby chose to regard it as private and unprotected when the employee can make a substantial showing the speech was protected as being on a matter of public concern?

2. Is a public employer who terminates an employee motivated by reports of speech denoting criticism of the employer's policies which reports, the employer has no reason to disbelieve, refer to protected speech on matters of public concern, entitled to qualified immunity from the employee's claim that the employer's actions violated the employee's First Amendment rights if the employer claims that because he did not know the exact content of the speech, he chose to regard it as private and unprotected where the employee can make a substantial showing it was protected as being on a matter of public concern?

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STATEMENT OF THE CASE

Respondent Cheryl Churchill brought this action against Petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital pursuant to 42 U.S.C. § 1983 alleging she had been discharged in violation of her right to speak on matters of public concern secured by the First and Fourteenth Amendments.* The facts bearing upon her claim are as follows, taking all inferences in favor of Respondent as appropriate on summary judgment:

A. The Cross-Training Policy

McDonough District Hospital (MDH) is located in Macomb, Illinois and is, under Illinois law, a municipal corporation. 70 ILCS § 910/15. Dr. Thomas Koch has been the clinical head of the MDH Obstetrics (OB) Department since 1980.[1] R.76D, T.19, pp 71-72; SR, Ex.A, p.4. As the head of OB, Dr. Koch has the legal obligation to ensure appropriate delivery of medical care and has always insisted on maintaining adequate nurse staffing levels.

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* The statement of the case is based on the Record developed in the district court by reference to the district court document number plus the tab number plus the appropriate page number, e.g. R.76B, T. ___, P. ___. References are omitted to the court of appeals volume numbers 1-9. In addition, there are some references to a Supplemental Record (SR) followed by an appropriate tab (T) and page (p) designation. Sometimes, instead of reference to a tab or page number following the document number, reference will be made to an exhibit (Ex) or other identifying designation.

[1] OB had both a clinical and an administrative head. R.76C, T.12, p.90; R.50; R.142, Ex.A; R.76A, T.4, pp 87-88; R.76E, T.24, p. 207. The clinical head was a doctor who was responsible for the quality of medical care performed by the department. *Id.* The administrative head was the doctor responsible for the credentialing of the doctors with staff privileges in the medical specialty. SR, Ex.A, pp 1-2.

R.76C, T.12, p. 90; R.50, Bylaws, pp 13-14; R.142, Ex.A; R.76A, T.4, pp 87-88; R.76E, T.24, p. 207; R.76D, T.13, pp 9-10. Respondent Cheryl Churchill was a registered nurse in OB from 1982 until her discharge in 1987. *Passim.*

In April, 1986, Petitioner Kathleen Davis became the vice president for nursing and implemented a new hospital-wide nurse staffing policy called cross-training. R.76A, T.4, pp 24-31, 40-45.[2] Petitioner Cynthia Waters was the OB nurse department head responsible for implementing that new policy in OB. *Id.* at 38. Dr. Koch opposed cross-training and Churchill and others joined him in that opposition because they believed the new policy impaired nurse staffing adequacy. *Id.*, 49-50, 81-82; R.76D, T.18, pp 301-344. OB nursing is one of the highly specialized nursing fields. R.76A, T.4, pp 30-31. Dr. Koch, Churchill and others were concerned that there was no systematic effort to train the non-OB nurses to work effectively in OB.[3] R.76E, T.24, pp 45-47; R.76D, T.18, pp 301-344; R.76D, T.19, pp 116-122; R.76C, T.12, pp 107-110. Rather, nurses from less specialized departments were irregularly sent to "train" in OB by following the OB nurses through their rounds. *Id.* Koch and Churchill believed that the OB nurses were diverted from giving appropriate attention to the patients by the obligation to "train" the cross-trainees. *Id.* Koch and Churchill also felt

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[2] Davis also brought a hospital management philosophy which asserted that nurse employees of the hospital were obliged to obey their hospital superiors even in the face of legitimate contrary physician directions respecting specific patient care. R.76A, T.5, pp 187-191. See p. 4, *infra*.

[3] Davis felt that OB was the second most specialized department behind the operating room (OR) followed by the Intensive Care Unit (ICU). R.76A, T.4, pp 30-31. The remaining departments, the medical floor, the surgical floor, emergency room (ER) involved less specialized nursing skills. *Id.* Davis said she could not cross-train in OR because of its high degree of specialization. *Id.*

the nurses' obligations to their patients precluded them from giving meaningful training to the cross-trainees. *Id.*[4]

Because Koch and Churchill insisted on adequate nurse staffing levels, both were under scrutiny by the MDH administration beginning the late summer of 1986. R.76A, T.3, pp 34-35, 46-47, 49, 51-55, 81-82, 97; R.76E, T.24, pp 110, 207, 210. MDH President Hopper maintained a file of criticisms that were compiled about Dr. Koch by Waters and Davis. R.76C, T.11, pp 107-108; R.76C, T.12, pp 41-54; R.76B, T.8, pp 256-260. Waters maintained a similar file on Churchill, R.76B, T.7. p. 127; T.8, p. 262, although, Waters agreed that Churchill had never been obstructionist in her opposition to cross-training. R.76B, T.7, pp 54-55.

B. The August 21, 1986 "Code Pink" And Application Of Davis' New Hospital Management Philosophy

MDH's anxiety over Koch and Churchill erupted into a campaign to dismiss both beginning August 21, 1986. R.76D, T.14, pp 110-137; R.76B, T.8, pp 256, 264-373; R.76C, T.12, pp 14-38, 94-114; R.76E, T.34-39; R.62; R.101; R.143, Ex.A, pp 1-5; R.123, Def. Ex.48. Early that day, Dr. Koch, performing an emergency caesarean section, ordered a "code pink" which required all available nursing and medical staff to report to the delivery room. *Id.* Dr. Koch directed Churchill to perform various tasks. R.76D, T.14, pp 110-137; R.76E, T.20, pp 186, 193.

Waters did not arrive at work until the "code pink" was underway. R.76D, T.14, pp 110-137, *Id.*; R.76B, T.8, pp

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[4] On July 29, 1986, there had been a meeting of the medical and nursing staffs of obstetrics. R.124, Dfdts' Ex.8, pp 83-88 (Churchill was not in attendance at this meeting as she was in California retrieving the personal effects of her son who had been killed that week in a traffic accident. R.76D, T.14, p. 132.) A portion of a colloquy between Dr. Koch and Kathy Davis reported in the minutes, R.123, Dfdts' Ex. 8, pp 85-86, of the meeting reflects the divergence of views.

264-271, 307, 328; R.76E, T.20, pp 184-241. Upon arriving, Waters "went in to take . . . control of . . . the delivery room." R.76A, T.5, p. 172-173. She ordered Churchill from the room to attend to a patient, R.76B, T.8, pp 281-294; R.76E, T.20, pp 192, 197, 201-226, although Churchill had already done so before the beginning of the "code pink", R.76D, T.14, p. 42; R.76E, T.20, pp 184-222; R.76B, T.8, pp 283-289. In addition, her order to Churchill, though consistent with the management philosophy of Davis, n.2, *supra*, conflicted with Dr. Koch's instructions to Churchill in the code pink. *Id.*; R.76A, T.5, pp 174-191; R.76B, T.8, pp 403-408. Nevertheless, Churchill obeyed Waters but told her she "didn't have to tell [Churchill] how to do her job." *Id.*; R.76D, T.14, p. 42.

Dr. Koch was furious at Waters for disrupting the procedure and ordering nurse personnel under his direction from the room. R.76B, T.8, pp 296, 312; R.76E, T.20, pp 220-224.[5] After the "code pink" procedure was successfully concluded, Koch told Waters he wanted to talk to her. *Id.*; R.76E, T.20, pp 226-227.

Waters asked Hopper to join the meeting. R.76B, T.8, p. 312; R.76C, T.12, pp 34-37; R.76E, T.36. Koch outlined his concerns respecting not just Waters' interference with his conduct of the "code pink" that morning, but the situation in OB generally. R.76E, T.36, T.20, pp 229-237. Hopper took notes.[6] R.76E, T.36. Dr. Koch also sent a

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[5] Illinois probably does not adhere to a strict "captain of the ship" theory of vicarious liability whereby a surgeon is responsible for the acts of all under his charge in the performance of a surgical procedure. See *Darling v. Charleston Community Hospital*, 211 N.E.2d 253, 257-258 (Ill. S.Ct., 1965); *Foster v. Englewood Hospital Association*, 313 N.E.2d 255, 259 (Ill.App.1st, 1974).

[6] According to Hopper's notes, Dr. Koch made the following points: "three other nurses" besides Churchill were "picked on by [Waters]"; "no progress on items" which had been previously discussed; a certain nurse was "a 'hazard' on the night shift"; not "appropriate to train three orientees at once";

letter on September 2 to Hopper further specifying his concerns about the August 21 code pink. R.76E, T.39. He requested that Hopper place a copy of the letter in Churchill's personnel file, R.76E, T.39, but Hopper refused to do that although commendations of an employee's performance customarily were placed in the employee's personnel file. R.76C, T.10, pp 110-136.

C. The Unsuccessful Secret Campaign To Deny Dr. Koch Reappointment To The Medical Staff

Hopper, Waters and Davis met the next day with Dr. Jack McPherson who was the medical administrative head of OB and responsible for deciding whether to recommend physicians for reappointment to the medical staff with OB privileges. R.76C, T.12, pp 24-39, 87-91, 94-107; R.76E, T.37; SR, Ex.A, pp 1-4. Instead of advising McPherson of Koch's concerns as Hopper had recorded them (n.6, *supra*), they told him that Koch was out of control and that Churchill was in alliance with him.[7] R.76C, T.12, pp 24-31, 87-89; R.76D, T.13, pp 53-74; R.76E, T.29, pp 38-43; R.76E, T.37; R.143, Ex.A, p. 2; R.76E, T.29, pp 19-20. They decided to talk to medical chief of staff and ex officio member of the medical staff credentials committee, Dr. Rodger Lefler, about keeping Koch from being reappointed to the medical staff for 1987 when the credentials committee met in November, 1986. *Id.*

Hopper and Waters met on August 25 with Lefler. R.76E, T.38; R.143, Ex.A, p.2; R.76C, T.11, p.134, T.12, pp

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"should not have people work at night who aren't ready to be there"; "want[ed] equal treatment for all people"; "d[idn't] like rotation in the nursery"; "want[ed] to make people working [in OB] happier"; felt that Waters should give "fair and consistent" "direction" to the staff and "if Cheryl [was] doing something wrong she (or anybody else) should be corrected".

[7] Petitioners attempted, during the first three years of this litigation, to conceal their campaign against Dr. Koch. R.62, 113. See order of June 22, 1990 compelling disclosure.

41-54, 100-114. Again, they did not report Dr. Koch's policy concerns as Hopper had recorded them on August 21, 1986 (n.6, *supra*). Instead, Waters resurrected a complaint against Dr. Koch dating back to 1982, when Koch had reported on a medical progress chart that inadequate nurse staffing was the reason for the near fatal birth of a baby.[8] R.76E, T.38; R.143, Ex.A, p.2; R.133, Ex.A, 9/8/82 entry; R.142, Ex.A. They also told Lefler that Dr. Koch cared only about "himself [and] Cheryl", *Id.*, even though Hopper had recorded on August 21 that Koch "wanted equal treatment for all people" and "if [Churchill] [was] doing something wrong, she should be corrected." R.76E, T.36.

The medical staff credentials committee met November 10, 1986, and admitted with full staff privileges for 1987 all doctors who had applied except Dr. Koch. R.123, Dfdts' Ex.48; SR, Ex.A. Koch's application was tabled on Dr. Lefler's motion made after representations by Hopper and McPherson. *Id.* Hopper volunteered to determine

[8] On September 8, 1982, Dr. Koch had a labor patient in OB and MDH administration had moved nursing staff from OB to another department. R.142, Ex.A. Dr. Koch feared that moving nursing staff from OB made the department less able to meet emergencies which developed. *Id.* That fear materialized when, because of another emergency, Koch's labor patient went unnoticed for 65 minutes during which the fetus was not getting sufficient oxygen. R.133, Ex.A, 9/8/82 entry; R.142, Ex.A. Koch was summoned and delivered the baby which was born dead. *Id.* He was able to revive the baby but it suffered mild retardation. *Id.* Koch noted the inadequate nurse coverage in a medical progress note. *Id.* Waters' anger that Koch made that notation manifested itself four years later on August 25, 1986 in the meeting with Dr. Lefler ("blamed 0/0 Apgar (no heartbeat, respiration or muscle tone) on low staffing in chart and had spoken to family"). R.143, Ex.A, pp 2-3 (R.76E, T.38 (as redacted)). The baby's parents sued MDH and Dr. Koch. R.142, Ex. A. The hospital paid a $200,000 settlement and Dr. Koch was exonerated of malpractice by a jury. *Id.*

from MDH lawyers what legal exposure anyone who recommended against Dr. Koch's reappointment might have. *Id.*

The hospital medical staff credentials committee met again on December 8, 1986, at which time Hopper and McPherson asked the committee itself to recommend against his reappointment in an effort to bypass the need for a recommendation from McPherson. SR, Ex.A.; R.123, Def. Exhibits, 49, 52. However, the chairman required McPherson to submit the prescribed recommendation form. *Id.* McPherson complied and recommended Koch's reappointment and Koch was reappointed for the 1987 calendar year.[9] *Id.*

D. Churchill's Employment History And The Campaign To Discharge Her

Churchill received standard to above standard employment evaluations through the evaluation period three weeks before her discharge. R.76E, T.33, *passim*. She had no disagreements with Waters which caused any strain in their relationship until the code pink incident. R.76D, T.14, pp 46, 136. Churchill never expressed any criticisms about Waters' performance as director except "as it pertained to patient care as a result of the cross-training policy." *Id.* at 79, 104-107; R.76D, T.18, p.239. When Churchill did express her concerns about staffing to Waters beginning in 1986, she did so in a "professional" manner. R.76D, T.14, p.79; R.76D, T.18, p. 222. Waters' usual reply was that she would "look into" Churchill's concerns. R.76D, T.14, p.82.

The only reprimand Churchill understood she received from Waters was the written warning on August 25, 1986, for saying "don't tell me how to do my job" in

[9] For the last two years Dr. Koch has served as the chief of the medical staff.

the August 21 code pink. (Pet App. 75).[10] Churchill said she said that in defense of her professional judgment, not intending to be insubordinate. R.76D, T.14, pp 123-136. Churchill said she "[did] not remember any comments regarding [the] general negative attitude" she was also charged with having. R.76D, T.14, p. 136-138; T.18, pp 169-174. Churchill disagreed with but did not protest the written warning. *Id.*

Waters' and Davis' evaluation of Churchill three weeks before her discharge credited her with a "standard performance" in "display[ing] a positive attitude toward the hospital and profession, accepting those things which cannot be changed, and constructively working to change those things which can and should be changed", and recommended her for a raise. R.76E, T.33; Evaluation 1/5/87, pp 1, 4. Their evaluation further credited Churchill with having corrected a problem they had noted six months earlier, viz., that she "need[ed] to work toward separating personal and professional matters while on duty", a reference to her relationship with Dr. Koch. Cf. *Id.* with *Id.*, T.33, Evaluation 7/7/86, p. 4; R.76A, T.5, p. 250.

At the conclusion of the printed form, Waters wrote by hand that she observed "negative behavior" on Churchill's part.[11] *Id.*, R.76E, T.33, 1-5-87 Evaluation p.5.

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[10] Petitioners gave the written warning to Churchill incident to their simultaneous decision on August 25 to attempt to deny Koch reappointment to the medical staff. R.76C, T.12, pp 52-54, R.76E, TT.34, 38; R.143, Ex.A, pp 2-3. A written warning was step two in a progressive discipline scheme consisting of first, a verbal counseling, second, a first written warning, third, a final written warning which [could] include suspension and last, discharge. R.76A, T.1, pp 36-39. However, Churchill never received a "verbal counseling" which she understood as a reprimand. R.76D, T.14, pp 77-79.

[11] The handwritten comments read in full: "Cheryl exhibits negative behavior towards me and my leadership – through her

Waters did not specify any incident. *Id.* When Churchill and Waters met on January 5 to discuss the evaluation, Waters "certainly did not" discuss with Churchill the handwritten allegation of "negative behavior." R.76E, T.23, pp 383-405. It was not unusual for Waters to write down different things from what she would say in the evaluation sessions. R.76E, T.24, P. 199. This time, however, Waters wrote the "negative behavior" remarks after consultation with Davis and Hopper for the purpose of recording a second written warning. R.76C, T.12, pp 11-14; R.76B, T.8, pp 391-402; R.76A, T.5, pp 247-265; R.76A, T.1, pp 36-38. They did not, however, put the "warning" in the form prescribed for the purpose of advising of a written warning. *Id.*; R.76B, T.8, pp 399-400.

E. The January 16, 1987 Dinner Conversation

On January 16, 1987, Churchill reported for work for her 3:00 to 11:00 shift. R.76D, T.18, pp 276-290; R.76E, T.24, pp 23-25, 33. Nurse Mary Lou Ballew[12] and cross-trainee, Melanie Perkins-Graham (Graham) were also assigned to that shift. R.76E, T.24, pp 23-27, 40; R.76E,

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actions and body language, i.e. no answer, one word abrupt answers followed by turning around and leaving, blank facial expressions or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation." R.76E, T.33, Evaluation 1/5/87, p. 5.

[12] Ballew had been hired in August, 1986. R.76A, T.3, pp 18-23. She had just completed a 90 day probationary period. R.76E, T.24, p. 25. After the August 21, 1986, "code pink" C section in which she had been criticized by Koch, she had learned from Waters that Dr. Koch and Churchill were viewed in disfavor by the MDH administration. R.76A, T.3, pp 35, 45, 55, 97; R.76D, T.17, pp 94-101. After that date, Ballew reported several incidents concerning Dr. Koch to Waters. R.76A, T.3, p. 48; R.76D, T.17, pp 147-148. Waters turned Ballew's reports into Hopper and Hopper maintained them in his file on Koch. R.76C, T.11, pp 107-112, 130; R.92, Supp. App. Koch, Exhibits A & B.

T.24, pp 23-25; R.76D, T.19, pp 18-28. Ballew arrived for work at 5:00 p.m., two hours after the shift began. R.76D, T.17, pp 94-101.

At 5:00 p.m., as was customary, Churchill and Graham began to eat their dinner in a kitchen area situated behind but within earshot of the main nurses station. R.76D, T.18, pp 282-290; R.76E, T.24, pp 33-36. Jean Welty, the shift supervisor, having finished her dinner, was leaving to answer the phone announcing a new patient. *Id.* Ballew, having just arrived at work, was standing behind the main desk. *Id.*; R.76D, T.17, pp 94-96.[13] Dr. Koch arrived to do his customary rounds and then went into the kitchen area where Churchill and Graham were eating. R.76D, T.19, pp 18-20. Graham said she was glad it was not busy because it was difficult to crosstrain in OB. R.76D, T.18, pp 292-293, 300-301; T.19, pp 19-21; R.76E, T.24, pp 44-45.

With that statement, Churchill, Graham, and Koch began a general 20 minute discussion about the cross-training policy. R.76E; T.24, pp 33-57. Shift supervisor Welty, who was filling out a chart on the new patient at the desk immediately outside the door, listened "very closely" to the conversation because she was interested in how Graham, from a less specialized nursing floor, reacted to the policy. R.76E, T.24, p. 45.

Welty heard Dr. Koch express his views that cross-training's application in OB harmed patients and increased malpractice risks and costs. R.76E, T.24, pp 40-57. She heard Churchill agree and say that Davis' policy as it was being sporadically implemented was going to "ruin" the hospital. R.76E., T.24, p.47. At the end

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[13] Ballew could not see who was in the kitchen area but could hear voices through the open door. R.76D, T.17, pp 102-104. Prior to January 16, Ballew did not know Graham and had only an acquaintance with Churchill with whom she had never talked one-on-one. R.76A, T.3, pp 94-95; R.76D, T.17, pp 105, 124.

of the conversation, Welty heard Graham say she was considering transferring to OB but had heard bad things about Waters. R.76E, T.24, pp 48-49, 198. Welty heard Churchill encourage her to transfer to OB, saying that Cindy Waters had good intentions but was sometimes "moody" because her job "wears her down." *Id.*, p. 49.

Churchill, in her testimony about the dinner conversation, R.76D, T.18, pp 276-344, recalled saying that cross-training as a concept had merit if applied effectively. *Id.*, 301-306, 309. She said that to be effective, crosstraining had to be structured with the same people participating on a regular basis to achieve consistent and frequent exposure to OB. R.76D, T.18, p. 309. Churchill said cross-training was not fair to patients because when a nurse cared for a patient, the patient was entitled to assume that the nurse was knowledgeable, which was not the case if the nurse was a cross-trainee. R.76D, T.18, pp 305-307, 310-317. She also recalled saying that in an emergency situation, a cross-trainee would not be competent to handle emergencies, which was unfair to the patient. *Id.*

Churchill admitted she said that Davis' cross-training policy was going to "ruin the hospital" because it "impeded patient care." R.76D. T.18, pp 321, 322 (R.37, T.4), 324, 329, 330. She said that Davis and the administration were more concerned about marketing and business matters than the delivery of nursing services, and that Waters concurred with the administration. *Id.*, p. 324.

Churchill testified that at the end of the 20 minute conversation, Graham said she had heard that Waters was difficult but did not know her personally. R.76D, T.18, pp 332, 339. Churchill said she described the situation in her last evaluation when Waters had given her a good evaluation both on the form and verbally but had written inconsistent remarks at the end of the evaluation which had "confused" her. R.76D, T.18, p. 334. Beyond that, Churchill said that Waters should not be a problem because she worked the early shift, R.76D, T.18, p. 292. Churchill said

she made no remarks critical of Waters in a personal sense. R.76D, T.18, pp 339, 340, 342-343.

Dr. Koch corroborated Welty's and Churchill's recollection of what was said, R.76D, T.19, pp 18-22, 30-34, 39-41, 45-50, and agreed Churchill may have said Davis was going to "ruin the hospital," but it was expressive of the "concept [that] cross-training as it was being carried out . . . was dangerous to patients." R.76D, T.19, pp 18-20, 30-34, 3941, 45-50. Koch also recalled that Graham commented she had heard criticisms of Waters and he recalled that Churchill said Waters could be avoided. R.76D, T.19, pp 45, 47.

Ballew testified she was answering lights when the speech took place. R.76A, T.3, p. 102; R.76D, T.17, pp 102-111. She did not see who was in the kitchen area, just "hear[d] voices" and "snatches and pieces" of the conversation, *Id.*, to which she "wasn't paying . . . much attention." R.76D, T.17, p. 103-104. She began overhearing the conversation after it began and "[came] in in the middle of sentence[s]" and the conversation "[didn't] make any sense" to her. R.76D, T.17, p. 107

F. The Ballew And Graham Reports Of The Conversation

Four days later, Ballew orally advised Waters that she (i) "overheard something . . . which was not good and . . . should not be happening and [Ballew] [wanted] [Waters] to be aware of its happening," and (ii) that "[Churchill] took [Graham] . . . into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." R.76E, T.42.[14] She

[14] At page nine of their brief, Petitioners quote Churchill's "summary" of Ballew's deposition testimony as to what Ballew said she heard Churchill say. However, what Ballew testified she heard is not what she reported to Waters. R.76E, T.42. Moreover, Ballew appears to have confused things she thinks she heard during the January 16 speech with things Waters had told her about Churchill and Koch. R.76A, T.3, pp. 94-95. The only thing about which Ballew was ever clear was that Churchill never directed any comments to Ballew, just to a group of which Ballew was a part, sometime in "December, January, maybe." R.76A, T.3, pp. 94-95.

further advised Waters that the conversation was negative and had "dampened the enthusiasm" of Graham, although Ballew never talked to Graham about the conversation. R.76A, T.3, p. 105; R.76D, T.17, pp. 125-128. Waters admitted that Churchill's speech as reported by Ballew could have referred to criticism of the cross-training policy. R.76B, T.8, pp. 436, 444, 447-448; R.76A, T.5, p. 310.

Upon hearing Ballew's report, Waters advised Davis and Hopper. R.76A, T.5, pp. 311-312. The three of them decided on January 20, 1987 to fire Churchill if Graham confirmed the conversation as reported by Ballew. R.76A, T.5, pp. 312-313. No one considered giving Churchill an opportunity to respond. R.76A, T.5, pp. 291, 321.

On January 23, 1987, Davis and Waters met with Graham. R.76B, T.8, pp. 444-446; R.76A, T.5, pp. 286-292, 312-315; R.76E, T.43. They told her they wanted confirmation of whether Churchill had criticized the hospital. *Id.* Graham was "nervous", "frightened", "reluctant to talk", *Id.*; R.76A, T.5, pp. 311-314; R.76E, T.43, and could not remember the conversation "very specifically" but did recall that it took 20 minutes. *Id.* She agreed that Churchill had (i) said "unkind and inappropriate negative things about Cindy Waters"; (ii) said "that just in general things were not good in OB and hospital administration was responsible"; (iii) said that "Kathy [Davis] was ruining the hospital"; (iv) "discussed her evaluation and that Waters wanted to wipe the slate clean"; and (v) said that "Waters had knowledge of everything Churchill was saying because Churchill had said it directly to Waters." R.76E, T.43; R.76A, T.5, pp. 287-291, 311-314.

Neither Waters nor Davis asked Graham whether her enthusiasm had been "dampened" by the conversation and Graham did not say it had been. *Id.*; R.76A, T.5, pp. 296, 304. Graham testified she did not feel "OB [was] a bad place to work." R.76B, T.6, p. 88.

G. The Discharge of Churchill

Davis' understanding of the speech reported to her by Graham was

> "that Cheryl said Cindy was a poor manager. I was ruining the hospital. The department was run badly. Cindy treated [Churchill] very badly . . . [and] Cheryl talked about her evaluation."

R.76A, T.5, pp. 287-288. Davis acknowledged that "[she] [didn't] know if [Churchill] was talking about the cross-trainee program or staffing or what . . . " with reference to the statement that "[Waters] was a bad manager". *Id.* at p. 289. Davis further acknowledged that Graham did not "specify in what respects [Churchill] thought [Davis] [was] ruining the hospital." *Id.* Davis' "impression" was that Churchill and Graham were "speaking just generally . . . overall without any specifics." R.76A, T.5, p. 290.

On January 26, 1987, Hopper, Waters and Davis met and Davis and Waters advised that Graham confirmed Churchill's speech, R.76A, T.5, p. 320. The three of them decided to fire Churchill. R.76C, T.11, pp. 7-41. Waters and Davis met with Churchill on January 27, 1987 and fired her. R.76A, T.5, pp. 320, 329-334; R.76E, T.T.44, 45, p. 331. They told her she had been overheard speaking in "negative" terms about the department, but did not tell her with whom or when she was overheard or what she was supposed to have said. R.76A, T.5, p. 331; R.76E, T.28, pp. 21-29; T.T.44-45. They did not seek her version. *Id.* Davis said Ballew's and Graham's reports gave them "enough information" that it "would not have been productive to understand [Churchill's] version." R.76A, T.5, p. 321.

After Waters and Davis discharged Churchill, Churchill grieved to Hopper.[15] R.76E, T.49. As the final authority respecting hospital personnel matters, Hopper did not regard Churchill's discharge as final until he had acted on the grievance she filed. R.76A, T.2; R.76C, T.10, p. 33. Hopper conducted the grievance proceeding on February 6, 1986 and limited his consideration to the August 21 "code pink", the January 5 evaluation, and Churchill's January 16, 1987 conversation without advising her of the date or persons involved.[16] Pet. App. 75; R.76E, T.23, pp. 411-415. Churchill, thinking the conversation was one she remembered having about "cross-training", attempted to advise Hopper of the problem with cross-training. *Id.* Hopper, however, said "he didn't want to get into that. . . . " Pet. App. at 76.

Hopper decided to discharge Churchill on his understanding Churchill had (i) said "Kathy Davis was ruining the hospital"; (ii) said "things were not good in OB and

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[15] She initially directed a letter of grievance to the vice president of personnel, Bernice Magin. R.76E, T.47. Magin told her that she should direct her grievance to Hopper thereby bypassing Waters and Davis because her grievance involved Waters and Davis who, Churchill believed, had unfairly discharged her. R.76E, T.23, pp. 407-411. Neither Hopper nor Magin told her that Hopper had played an equal part with Davis and Waters in discharging Churchill. *Id.*

[16] Petitioners devote page 14 of their brief to suggesting that Churchill was, in fact, on notice as to when the subject conversation had taken place and to whom she had spoken. That is inaccurate. R.76E, T.23, pp. 411-412. See also statement of Vice President for Personnel Magin who attended the grievance proceeding at Hopper's request where Magin reports that Churchill said in response to Hopper's question as to whether Churchill had said the things she was reported to have said, "I do not know what evening she (Waters) is referring to and I don't know who was working." R.76E, T.51, p. 7. All she could remember was that one evening she had discussed cross-training with a cross-trainee. R.76E, T.23, pp. 411-415.

administration was responsible", and (iii) reported an "instance . . . where Churchill said [Waters] continued to pursue the matter of a patient complaint [against Churchill]." R.76C, T.10, pp. 156-157. Hopper said the statement that Davis was "ruining the hospital" was improper because "it undermine[d] the work that Davis is trying to do in the hospital." R.76C, T.10, p. 158. His basis for that conclusion was that "[he] [didn't] agree with the statement" and she "[was] voicing it to the wrong forum." *Id.* Hopper said she should have voiced it "to . . . Waters, . . . Davis, or [him]." *Id.*

Hopper testified he had "no reason to disbelieve" that Churchill's statements that Davis was "ruining the hospital" and "things were not good in OB and administration was responsible," referred to cross-training. R.76C, T.10, pp. 159-160. Hopper also said he had "no reason to disbelieve that any criticism that . . . Churchill may have leveled against Cindy Waters to the cross-trainee . . . related to the [cross-training program]." *Id.* at 162.

Jean Welty, the shift supervisor who heard all of Churchill's speech, testified that it did not disrupt anything. R.76E, T.24, pp. 52-53. Welty testified that she "would have liked to have been a participant" but had finished her dinner and "had other things . . . to do." *Id.*, p. 108. Welty also testified that Graham was "enthusiastic" at the end of the shift and said she would give "careful consideration" to transferring to OB. *Id.*, pp. 192-193. Most OB nurses had never heard of Churchill's conversation and none heard of any adverse effect it may have had. R.92 (All nurse depositions except Ballew).

SUMMARY OF THE ARGUMENT

A. The summary judgment record demonstrates petitioners were motivated by reports of Churchill's speech denoting criticism of Petitioners' policies. Petitioners claim they did not know the content of that speech and chose to construe it as private, insubordinate

speech and fired her. Churchill can show her speech was protected as being on a matter of public concern. Petitioners made no effort to regulate with precision speech alleged to be private and insubordinate. They, therefore, risked indiscriminately punishing protected speech under the guise of punishing alleged unprotected personal speech.

1. The court of appeals considered Churchill's speech in the context of a six month dispute between the hospital administration and the hospital's professional medical and nursing staffs. It considered that what Petitioners claimed were acts of Churchill's insubordinate behavior occurred before they gave her a final personnel employee evaluation showing her to be a conscientious and dutiful employee. The Court, therefore, concluded that Petitioners' claim that her speech was insubordinate and unprotected was pretext unless her speech, in fact, proved to be private and insubordinate.

2. The Petitioners made no reasonable effort to determine the actual content of Churchill's speech, the reports of which denoted critical speech on matters of public concern which they had "no reason to disbelieve" was protected. By failing to make any reasonable effort, the Petitioners acted deliberately indifferently and, therefore, at their risk in describing her speech as insubordinate and unprotected. An issue of fact, therefore, exists as to whether Petitioners were motivated by her protected speech to discharge her.

B. At the very least, the Petitioners, in making no attempt to ensure that her speech was unprotected before they discharged Churchill, risked punishing protected speech on matters of public concern indiscriminately with any unprotected speech as may have been involved. They employed no procedures or safeguards required by the First Amendment to ensure against indiscriminate prohibition of protected along with unprotected speech, particularly when the line between the two is "finely drawn." *Speiser v. Randall*, 357 U.S. 513 (1957). As such,

they created an unreasonable risk of infringing Churchill's right to speak on matters of public concern and the public's right to receive the benefit of that speech from the special knowledge possessed by public employees.

C. On the basis of the reports they received of Churchill's speech denoting criticism of the policies of Petitioners and the absence of any reason to disbelieve that the reports referred to protected speech on matters of public concern, Petitioners had no reasonable basis to conclude Churchill's speech was insubordinate. Accordingly, they had no reasonable basis to conclude that it did or could have had any forbidden adverse effect on Petitioners' discharge of the public function of the hospital. Accordingly, Petitioners are not entitled to any benefit from *Connick's* (*v. Myers*, 461 U.S. 138 (1983)) "reasonable apprehension" of disruption test.

D. It was clearly established in January, 1987, that a public employee had a right to give on-premises speech on her own time denoting and which the employer had no reason to disbelieve was on matters of public concern and which did not give any reasonable basis for believing would disrupt the function of the hospital. Accordingly, the individual Petitioners are not entitled to qualified immunity from Churchill's suit alleging deprivation of her rights as a public employee to speak on matters of public concern where she can show her speech was in fact on matters the law recognizes as protected.

E. The Petitioner Stephen Hopper as the CEO of the Petitioner hospital was delegated by the board of the hospital with final and complete responsibility not just to hire and fire but to develop personnel policies and procedures. Hopper first developed the policy restricting employee speech critical of the hospital to be delivered only to hospital supervisors exclusive of any persons of lesser hierarchical stature. In addition, Hopper, as the clearly defined final authority, as delegated to him by the

hospital board in matters of hiring and firing, participated both in the decision to discharge Churchill and then, unknown to Churchill, to affirm that decision in a grievance proceeding she filed with him. As such, Hopper, as the final authority on matters of hiring and firing and personnel policies generally, expressed the policy of the hospital in discharging Churchill in violation of her right to speak on matters of public concern.

ARGUMENT

I.

THE EVIDENCE BEFORE THE DISTRICT COURT ON SUMMARY JUDGMENT SUPPORTS A FINDING THAT PETITIONERS WERE MOTIVATED BY CHURCHILL'S PROTECTED SPEECH TO DISCHARGE HER.

A.

Principles Governing On Summary Judgment And Governing Disposition Of Cases Raising First Amendment Speech Issues Support The Court Of Appeals' Finding That Issues Of Fact Exist As To Whether Petitioners Were Motivated By Churchill's Protected Speech To Discharge Her.

Public employees cannot "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of (the public entity) in which they worked. . . . " *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Public employees in specialized areas " . . . are, as a class, the members of a community most likely to have informed and definite opinions [respecting the operation of the public entity for which they work]." *Id.* at 572. For that reason, it is "essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.*

For public employee speech to be protected, it must be on a matter of public concern. *Id.* at 568, 572. Whether speech is on a matter of public concern is determined "by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).[17] "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick, supra* at 147-148 n.7. But what the content, context, and form of the speech in question are present issues of historical fact. *Rankin v. McPherson*, 483 U.S. 378, 385-386 ns. 8, 9 (1987); Schwarzer, *Summary Judgment Motions*, 139 F.R.D. 441, 455-456, 487 (1992). If it is determined the speech was protected, the plaintiff must then prove as a factual matter that it "was . . . a 'motivating' factor" in the termination decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). See also *Village of Arlington Heights v. Metropolitan Housing District*, 429 U.S. 252, 264-65 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976).

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[17] Churchill does not understand Petitioners to challenge the court of appeals' holding, Pet. App. 10-22, that the cross-training policy in terms of content was a matter of public concern. Pet. 11-12 n.11. Cf. Brief, United States, pp. 12-13 n.2. This Court has defined "public concern" as referring "to any matter of political, social, or other concerns of the community." *Connick v. Myers, supra*, 461 U.S. at 146. See *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (quality of nursing care received by inmates in prison hospital, matter of public concern). See discussions of public concern in *Piver v. Pender Board of Education*, 835 F.2d 1076, 1078 (4th Cir. 1987) and more recently, in *O'Connor v. Steeves*, 994 F.2d 905, 913-915 (1st Cir. 1993). The context of Churchill's speech is disputed, Churchill claiming it came in the midst of a six month debate between the professional staff and the administration on nurse staffing policies, the defendants claiming it was the culmination of a series of acts of insubordination. The form of the speech appears to be undisputed, namely, oral comments made during a dinner break. The content, of course, is vigorously disputed.

See also *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993).

" 'First Amendment freedoms need breathing space to survive. . . . ' " *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). For that reason, " 'government may regulate in the area [affecting First Amendment freedoms] only with narrow specificity.' " *Id.* Therefore, " '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . ' " *Id.* at 603. The reason " 'precision of regulation must be the touchstone . . . ' ", *Id.*, is that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Speech protected by the First Amendment permits the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Therefore, a paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966).

Against that framework for considering public employee free speech cases, Petitioners say:

> "[t]here is no evidence that Defendants ever were informed that Churchill had discussed cross-training with Graham. Thus, Defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her."

Pet. Brf. p. 24. Petitioners then say:

> "[t]he undisputed fact remains that at least some of Churchill's version of the conversation – the only portion reported by Ballew and Graham – did not address issues of public concern. Since there was no evidence defendants were motivated by anything other than Ballew's and Graham's reports, the Court of Appeals erred in finding a genuine issue of material fact as to the content of the conversation."

Pet. Brf. pp. 34-35 (emphasis omitted). The thrust of both those submissions by the Petitioners is not just in dispute in the summary judgment record, it is belied by the summary judgment record.

The summary judgment record is explicit: Davis made the decision to terminate because she understood Churchill had (i) said "Cindy was a poor manager", (ii) said "[Davis] was ruining the hospital", (iii) said "the department was run badly", (iv) said "[Waters] treated [Churchill] . . . badly", and (v) had "talked about her evaluation." R.76A, T.5, pp. 287-288. By any etymological or syntactical measure, the first three points Davis understood of Churchill's speech more clearly denote policy than personal criticisms. They represent an "impersonal attack on government operations" which is constitutionally protected. *Rosenblatt v. Baer*, 383 U.S. 75, 80 (1966).

Hopper, in turn, was motivated to, first, participate in the discharge decision and then to uphold it on the basis of his understanding that Churchill had (i) said "Davis was ruining the hospital", (ii) said "things were not good in OB and administration was responsible", and (iii) had reported an "instance . . . where . . . [Waters] continued to pursue the matter of a patient complaint against [Churchill]." R.76C, T.10, pp. 156-157.[18] Again, the

[18] Churchill concedes that her reported statements that Waters treated her badly, Waters was pursuing the matter of a false patient complaint against her and that she talked about her evaluation are likely private, unprotected speech. Those statements form 38% of the speech which motivated Davis and Hopper to act, the remaining 62% denoting likely policy criticism which Hopper, Waters and Davis had "no reason to disbelieve" was protected speech. Cf. *Connick, supra*, where this Court held that where only one out of fourteen items on a questionnaire constituted protected speech, the speech was more properly viewed as an employee grievance.

first two points Hopper understood of Churchill's speech more likely denote policy than personal criticism.

Davis said "[she] [didn't] know if [Churchill] was talking about the cross-trainee program or staffing or what . . . " and acknowledged that Graham did not "specify in what respects [Churchill] thought [Davis] [was ruining the hospital]." R.76A, T.5, pp. 287-289. Instead, Davis' "impression" was that Churchill and Graham were "speaking just generally . . . overall without any specifics." *Id.* Likewise, Hopper had "no reason to disbelieve" Churchill's statements that Davis was "ruining the hospital" and "things were not good in OB and administration was responsible" referred to cross-training. R.76C, T.10, pp. 159-160. He further said he had "no reason to disbelieve that any criticism that Churchill may have leveled against . . . Waters . . . related to [cross-training]." *Id.* at 162.

The court of appeals held that speech was protected conduct under *Mt. Healthy* and Churchill, by having shown she was fired for having engaged in speech which, as far as Petitioners understood, was on cross-training, had satisfied the *Mt. Healthy* causation test. The court held it unnecessary that the employer knew the "precise content of the speech." 977 F.2d at 1127. The court thus applied *Mt. Healthy* so as to ensure that Churchill's speech which Petitioners claimed was personal and unprotected "actually [fell] within the unprotected category." *Bose v. Consumers Union*, 466 U.S. 485, 505 (1984). It held that could be determined only by a jury finding whether the point of the speech in question concerned the nurse staffing issues which the court held were of public concern. 977 F.2d at 1127. Thus, the court appropriately applied *Mt. Healthy* to "confine the perimeters of any unprotected category within acceptably narrow limits in

an effort to ensure that protected expression [would] not be inhibited." *Bose, supra,* 466 U.S. at 505.[19]

On summary judgment, the nonmoving party "must make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). However, as established in *Adickes v. Kress & Company,* 398 U.S. 144, 156-157 (1970), and reaffirmed in *Celotex, supra,* 477 U.S. at 325, that showing can be made where the "sequence of events create[s] a substantial enough possibility [that the nonmoving party can establish the essential element] to allow [the nonmoving party] to proceed to trial. . . . "[20]

The *Adickes* principle applies to this case. It supports the rationale and result reached by the court of appeals under either or both of two established approaches, (i)

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[19] See also *Rankin v. McPherson,* 483 U.S. 378, 386 n.9, quoting *Bose, supra,* 466 U.S. at 499, saying "in cases raising First Amendment issues [the Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' "

[20] Petitioners devote pages 33-36 of their brief to arguing the district court was correct in granting summary judgment to them. They fail, however, to advise this Court that in granting summary judgment, the district court overlooked all but two pages of Churchill's 38 pages of testimony as to the content of her speech. It overlooked all of Welty's and Koch's testimony relative to the content of Churchill's speech. The two pages of Churchill's testimony the district court acknowledged (R.76D, T.18, pp. 342-344) were not pages where she responded to questions asking what she said; rather, she was responding to questions asking what she did not say. And, even in those pages, Churchill specifically refuted the "hostility" and intent to "gripe" theories that the district court found motivated her speech even though she was the nonmoving party on summary judgment.

the historical context in which the discharge decision occurred and (ii) the Petitioners' "deliberate indifference" to protected conduct. Those approaches permit "a jury . . . to infer from the circumstances that [the Petitioners were motivated by Churchill's protected speech to discharge her]", *Adickes, supra,* 398 U.S. at 158. That is particularly true where motive is in issue because motive, similar to intent, "rarely can be decided on summary judgment." *Harlow v. Fitzgerald,* 457 U.S. 800, 816-17 (1982).

1.

The Record Shows Petitioners Discharged Churchill Upon Reports Of Speech Denoting Criticism Of Petitioners' Cross-Training Policy Occurring In The Context Of A Six Month Dispute Concerning That Policy Thereby Raising A Question Of Material Fact As To Whether Petitioners Were Motivated By Churchill's Protected Speech To Discharge Her.

To determine motivation for official action alleged to infringe constitutionally protected interests, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Village of Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. at 267. Thus, "[t]he specific sequence of events leading . . . to the challenged decision . . . may shed . . . light on the decision maker's purposes." *Id.* See also *Washington v. Davis, supra,* 426 U.S. at 242. "Determining whether [an] invidious . . . purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra,* 429 U.S. at 266.

Disregarding principles governing on summary judgment, the Petitioners' statement of Churchill's employment history (Pet. Brf. 4-9) overlooks that before and after

August 21, 1986, Churchill was acknowledged, in Petitioners' own objective evaluations, to be a conscientious and dutiful employee. Indeed, the most remarkable fact to emerge from the record and emphasized by Petitioners, albeit for the wrong reasons, is that Churchill specifically avoided pleading her own employment circumstances on the one occasion she understood she was in conflict with her supervisors, the code pink incident, and the other occasion where her supervisors created, unbeknownst to her, a conflict, the January 5, 1987 evaluation (pp. 12-13, *supra*). She, therefore, avoided the plaintiff's actions in *Connick v. Myers, supra*, 461 U.S. at 148, where the Court concluded that what the plaintiff claimed was protected speech was in fact an attempt "to gather information for another round of controversy with her supervisors . . . and . . . turn [her] displeasure into a cause celebre."

Petitioners denigrate Churchill's claim that she was fired for having engaged in protected speech by saying that others spoke critically of cross-training and none was fired for it. It is true that the hospital sometimes tolerated criticism of cross-training.[21] But, it was Churchill's professional and personal friendship with Dr. Koch that made her criticism on January 16 potent. The hospital, as Justice Holmes said,"allow[ed] opposition by speech" when it "thought the speech impotent, as when a man says he has squared the circle. . . . " *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919). In light of the fact that public employee speech is of specially recognized value to the community, *Pickering, supra*,

[21] Not always. At least one other OB nurse, Jan Sullivan, who criticized the cross-training policy to a hospital board member at a non-hospital related luncheon, was reprimanded by Kathy Davis. R.92, Sullivan Dep. pp 11-13. She was told not to discuss hospital matters such as the cross-training policy outside the hospital. *Id.*

391 U.S. at 572,[22] it rightly is not restricted to only the innocuous. See *Rankin v. McPherson, supra*, 483 U.S. at 387. (" '[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' ")

Most importantly, the factual picture presented by the Petitioners overlooks the surreptitious campaign conducted by Waters, Davis and Hopper after the August 21 "code pink" to rid themselves of Churchill and Koch. Dr. Koch's and Churchill's role in the controversy surrounding the policy led Petitioners to maintain special files on both of them in an effort to gather information and take action against them on a pretext independent of their speech.[23]

Thus, they attacked Dr. Koch on the basis of the code pink and its aftermath where his professional performance and behavior were nothing short of exemplary.

[22] See in that regard *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), holding that a broad conception of the First Amendment is necessary

> "to supply the public need for information and education with respect to the significant issues of the times . . . Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

[23] Consequently, the series of supposed transgressions by Churchill listed by Petitioners at pp 4-9 of their brief. Not only are all events listed disputed, they are all refuted by Petitioners' objective evaluation of Churchill as late as three weeks before her discharge. At the very best, they reflect complaints solicited by Waters after the code pink, none of which was ever brought to Churchill's attention. Their meritless nature is highlighted by Petitioners' position, sustained by the district court, that Churchill had no property interest in her employment and, therefore, could have been discharged for any reason or no reason at all. *Board of Regents v. Roth*, 408 U.S. 564 (1972). She was not, however, discharged until her January 16 speech.

They distorted that performance and behavior into allegations of his being out of control.[24] But, they were ultimately unsuccessful in preventing his reappointment to the staff in 1987.

At the same time, they gave Churchill a written warning for snapping at Waters during the code pink, a stressful procedure, after Waters, without information about the care Churchill had already given her patient or the instructions Dr. Koch had given Churchill, ordered Churchill to leave and check on a patient. A jury could readily determine that it was Waters who acted unreasonably and that a fair minded administrator would recognize Churchill's response as understandable and would have agreed to place Dr. Koch's commendation of Churchill in her personnel file.[25] A jury could also conclude that Petitioners' reliance on this incident as a basis for disciplining Churchill was strained and not in good faith, in short, a pretext for disciplining her for her opposition, in conjunction with Dr. Koch, to cross-training.

Similarly, Waters appended to Churchill's generally favorable final evaluation in January, 1987, vague

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[24] Consider the meeting among Koch, Waters and Hopper in the immediate aftermath of the code pink. It would be difficult to more diligently state a doctor's considered yet spontaneously spoken concerns for the welfare of patients and employees alike than do Hopper's notes of what Koch said at that meeting. See n.6, *supra*. But, Waters and Hopper did not advise administrative chief of OB McPherson or medical chief of staff Lefler of what Koch had said when they met with them on August 22 and August 25 respectively. Instead, they told them that Koch was out of control and that Churchill was somehow in league with him and the two of them had to be disciplined. R.76C, T.12, pp 15, 24, 33-35, 103.

[25] Dr. Koch did not know Churchill had received a written warning when he delivered the letter of commendation to Hopper. R.76E, T.20, p. 2. Churchill had obeyed Davis' order not to speak to anyone about it. R.76E, T.38, p.2; R.76D, T.18, pp 169, 173-174.

allegations of "negative behavior." Waters did not identify any incident in which Churchill exhibited such "negative behavior." She did not mention that criticism to Churchill in their meeting to review the evaluation. The allegations were not in the form prescribed in the handbook for written warnings. R.76A, T.1, p. 36. Therefore, the evidence is in dispute, at least, about whether there was any basis for the "negative behavior" charge or whether it too was a subterfuge for the hospital's attempt to stifle Churchill's opposition to cross-training. A jury could well conclude it was a subterfuge.

It could also conclude that whether it was or not, Waters was not acting in good faith by adding her note to Churchill's evaluation because she did not even discuss it with Churchill. Rather, she appended it, in collaboration with the other Petitioners, in the attempt to build a case against Churchill motivated, in fact, by Churchill's opposition to the crosstraining policy.

It was in that context Petitioners received the report from Ballew, a nurse who had already been providing them tidbits against both Churchill and Koch, about the dinner break conversation Churchill had with Graham and Dr. Koch. Petitioners concede that this conversation included discussion of the nurse staffing issues, including cross-training. They do not dispute that this was a matter of public concern. Ballew, however, heard only "bits and pieces" of the conversation and did not understand what she heard.

Nevertheless, in the context of the history of the crosstraining policy controversy, much of what Ballew and Graham reported must have struck Petitioners as comments by Churchill related to that controversy. At least, a jury could so conclude. For example, Graham reported that Churchill said conditions in OB were not good and that Davis was "ruining" the hospital. Given Petitioners' familiarity with the controversy about cross-training, Dr. Koch's and Churchill's role in it, their antagonism toward Dr. Koch and Churchill on the basis of it, a

jury might well determine that Petitioners knew that her comments were directed to that issue or that it was unreasonable for them not to realize that.

Moreover, Graham might not have understood what Churchill said but a jury could well decide on the evidence that Petitioners surely did as Davis was relatively new to MDH and the cross-training policy was clearly identified with her. Both Churchill and Dr. Koch made known that they believed the policy as implemented in CB sacrificed patient care and safety in an unreasonable attempt to realize cost savings. Thus, this is not a case where Petitioners had no indication that the speech was about a matter of public concern.

Nor is it the case where Petitioners made a reasonable investigation and concluded incorrectly that the speech was not about a matter of public concern. Rather, a jury could recognize that Petitioners would know that any criticism of Davis by Churchill was likely related to the cross-training policy – particularly in the terms it was reported to and understood by Petitioners, viz, "Davis going to ruin the hospital", "things bad in OB and administration responsible."

Cast into the framework of this Court's most recent pronouncement on the burden of proof in employment cases, *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2749 (1993), Churchill can show the following: she was discharged for having engaged in speech; her employer was motivated by reports of her speech denoting policy criticisms to discharge her; her employer had "no reason to disbelieve" her speech concerned cross training; and her speech was protected. The only thing she cannot conclusively show is that the employer knew the precise content of her speech and discharged her for having engaged in protected critical speech as opposed to critical speech *simpliciter*.

Yet, placed into the context of the six month dispute between the professional nursing and medical staffs and the hospital administration concerning nurse staffing

issues generally and cross-training in particular, as described *supra*, pp. 32-35, a fact finder could readily disbelieve the "insubordination" "reasons put forward by the defendant." *St. Mary's Honor Center, supra*.[26] That disbelief, "together with the elements of the *prima facia* case", Churchill can show would "*permit* the trier of fact to infer the ultimate fact [that Petitioners discharged her because of her protected speech]." *Id*. (Emphasis in original). *Adickes, supra*.

2.

The Record Shows That Petitioners Were Deliberately Indifferent To Whether The Reports Of Churchill's Speech, Which Motivated Them To Discharge Her, Referred To Protected Speech On Matters Of Public Concern Thereby Raising Questions Of Material Fact As To Whether They Were Motivated By Her Protected Speech To Discharge Her.

" '[A] deliberate choice to follow a course of action- . . . made from among various alternatives . . . ' " which results in a constitutional deprivation can be actionable under §1983. *Canton v. Harris*, 489 U.S. 378, 389 (1989), quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986). Under the deliberate choice standard, where official action "reflects a 'deliberate' or 'conscious' choice" resulting in a constitutional violation can the official be held liable under §1983. *Canton v. Harris, supra*, 489 U.S. at 389. That conscious choice amounts to "deliberate indifference" where the possible infringement of a right secured by the Constitution is " 'so obvious' that failure to [choose a course of action not violative of the right]

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[26] Cf. *Givhan v. Western Line Con. Sch. Dist.*, 439 U.S. 410, 412-413 (1979), where the employer had pejoratively characterized the employee's speech as "petty", "insulting", etc.

could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton v. Harris, supra,* 489 U.S. at 390 n.10.

Similarly, under the Eighth Amendment prohibition of "cruel and unusual punishment", the Court has concluded that certain failures or refusals to treat prisoners amounts to a constitutional violation. But, the Court has made clear that neither "negligent diagnosis nor customary malpractice would amount to the type of deliberate choice among alternatives which would state a constitutional violation."[27] *See Estelle v. Gamble,* 429 U.S. 97, and ns. 10-12 (1976). Rather, a conscious choice to forego a course which would preserve the constitutional interest is required. *Id.*

This Court explained in *Connick, supra,* 461 U.S. at 147, that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government. . . . " In fulfilling that responsibility, no less than the "deliberate indifference" test applied in the Eighth Amendment and municipal policy contexts is warranted to ensure that the free speech rights of public employees are not infringed.[28] The "deliberate

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[27] That, of course, is consistent with the rule that merely negligent infringements of the Due Process Clause do not amount to constitutional violations. *Daniels v. Williams,* 474 U.S. 327 (1986).

[28] The United States suggests a "willful blindness" test extracted from §2.02(7) of the Model Penal Code which provides that

> "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware whereby probability of its existence, *unless he actually believes that it does not exist.*"

(emphasis supplied). The United States does not explain why that test is more plausible than the "deliberate indifference" standard already employed in some civil §1983 contexts.

indifference" of Waters, Hopper and Davis to Churchill's rights to free speech is manifest.

As far as Waters, Davis and Hopper knew, the subject of Churchill's speech was cross-training. The reports of the speech upon which they acted, "Davis ruining the hospital" and "things bad in OB and hospital administration responsible" more clearly denote policy than personal criticism. Yet, none articulated a reason why he/she chose to view her speech as private and unprotected as opposed to public and presumptively protected. They did say, however, why they did not seek Churchill's version: on Ballew's and Graham's reports they "had enough information [to fire Churchill]." R.76A, T.5, p. 321. Therefore, they decided it "would not have been productive to understand [Churchill's] version of the conversation." *Id.* That was a knowing, conscious choice.

That choice ensured that Churchill's speech, if on cross-training, would be punished. That choice constituted a deliberate avoidance of information which Petitioners recognized could have upset the conclusion they wanted to reach. *Canton v. Harris, supra,* 489 U.S. at 389. From that deliberate avoidance, a jury could find that to

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Presumably due process requires that a higher degree of certainty be shown to prove knowing criminal conduct than should be required to prove conduct subjecting one to civil liability. *In re Winship,* 397 U.S. 358 (1970). Nevertheless, even as this Court has applied the "willful blindness" test in a criminal context in such cases as *Turner v. United States,* 396 U.S. 398 (1970) (defendant would be aware of a high probability that heroin came from a foreign country), and *Barnes v. United States,* 412 U.S. 837, 845-46 (1973) ("petitioner must have known or been aware of the high probability that the checks were stolen . . . "), indicates that Churchill has more than satisfied the "willful blindness" test in this case on the summary judgment record. Indeed, Churchill has negated the possible exemption Petitioners might claim in that Petitioners have admitted they had "no reason to disbelieve" her speech was protected.

punish her speech on cross-training was Petitioners' motivation. *Adickes, supra,* 398 U.S. at 158.

B.

At The Very Least, Churchill Was Dismissed Without Safeguards Necessary To Assure Public Employee Speech On Matters Of Public Concern The Protection the First Amendment Requires.

"When [a court] deal[s] with the complex of strands in the web of freedoms which makeup free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in light of the particular circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520 (1957). Thus, a court should ensure that "when the [public employer] undertakes to restrain [and punish] unprotected speech, it . . . provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." *Id.* at 521. Because "the line between speech unconditionally guaranteed and speech which may legitimately be . . . punished is finely drawn . . . , the separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . . " *Id.* at 525.[29]

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[29] See also *Elfbrandt v. Russell,* 384 U.S. 11 (1966), involving a loyalty oath requirement subjecting to prosecution and discharge from public office any person who "knowingly . . . [became] or remain[ed] a member of the Communist Party . . . " or any organization having for "one of its purposes" the overthrow of a state government where the employee had knowledge of the unlawful purpose. The Court struck down the oath on the grounds that protected association was *indiscriminately condemned along with unprotected association. Id.* To the same effect is *United States v. Robel,* 389 U.S. 258 (1967). (Emphasis supplied).

The principle of *Speiser v. Randall, supra,,* was applied in a public employee union shop setting in *Chicago Teachers v. Hudson,* 475 U.S. 292 (1986), where this Court held the First Amendment required procedures ensuring protection of the rights of nonunion workers not to contribute to union ideological activities even though there was no suggestion contributions were made. The Court held such procedures required because " 'procedural safeguards often have a special bite in the First Amendment context.' " 475 U.S. at 303 n.12 (citations omitted). The purpose of the procedures was

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Likewise in *Roaden v. Kentucky,* 413 U.S. 496 (1973) and *Marcus v. Search Warrant,* 367 U.S. 717 (1961), the Court held that seizures of allegedly obscene materials, even if valid in customary Fourth Amendment terms, were unconstitutional where the seizure indiscriminately subjected non-obscene and, therefore, protected materials to confiscation. The Court held "the seizure[s] . . . unreasonable, not . . . because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden, supra,* 413 U.S. at 504. That higher hurdle is required by the First Amendment and its prohibition of prior restraints. *Id.* Similarly, in *Freedman v. Maryland,* 380 U.S. 51 (1960), the Court, in striking down a Maryland motion picture censorship statute requiring submission of a film to an administrative board prior to showing, held that " . . . a judicial determination in an adversary proceeding" was necessary to "ensure the necessary sensitivity to freedom of expression." *Freedman, supra,* 380 U.S. at 57. See also *Teitel Film Corp. v. Cusak,* 390 U.S. 139 (1968) and *Lo Ji Sales v. New York,* 442 U.S. 319, 326 n.5 (1979).

And, as Justice Kennedy recently noted, "[t]here can be little doubt that regulation and punishment of certain classes of unprotected speech has implications for other speech which is close to the proscribed line, speech which is entitled to the protections of the First Amendment." *Alexander v. United States,* ___ U.S. ___, 61 L.W. 4796, 4801 (1993) (Kennedy, J., dissenting). In those situations, "the government must use measures that are sensitive to First Amendment concerns in its task of regulating or punishing speech." *Id.* at 4804.

"to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Id.* That was necessary because "First Amendment rights are fragile and can be destroyed by insensitive procedures." *Id.*

This Court specifically acknowledged in a public employee retaliatory discharge setting in *Board of Regents v. Roth*, 408 U.S. 564, 574-575 n.14 (1972), the importance of procedure to protect the speech of public employees.[30] In *Roth*, the Court said when the state has "directly [impinged] upon interests in free speech or free press, [it] ha[d] held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." However, since allegations of "direct impingement" on speech were not before it in *Roth*, the Court declined to apply the doctrine. *Id.*[31]

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[30] See Monaghan, *First Amendment "Due Process"*, 83 Harv.L.Rev. 518 (1970). First Amendment "due process" appears to be another of the "ancillary doctrines", such as "overbreadth" that "helps ensure that government . . . focus[es] on its legitimate interests" "when it [takes] action affecting free speech." Bogen, *First Amendment Ancillary Doctrines*, 37 Md.L.Rev. 679, 681 (1978). See e.g. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[31] In *Connick v. Myers, supra*, 461 U.S. at 147, the Court said that even unprotected public employee speech does not "fall[] into one of the narrow and well defined classes of expression which carr[y] so little social value, such as *obscenity*, that the state can prohibit and punish such expression by all persons in its jurisdiction." (Emphasis supplied). By the doctrine of *Freedman, supra; Marcus, supra; Roaden, supra*, the prohibition of obscene expressive material requires the establishment of procedures to ensure that nonobscene protected material is not brought within the sweep of the prohibition. Surely, the prohibition by punishment of nonprotected personal speech, speech on a higher rung than obscene speech, *Connick, supra*, by a public employee should not be allowed to sweep within its reach potentially protected speech on matters of public concern. Just as in *Speiser v. Randall, supra; Robel, supra; Freedman, supra; Chicago Teachers, supra*, "sensitive tools" are required to ensure that speech on matters of public concern by public employees is not punished.

Allegations of "direct impingement" are before the Court in this case.

Unlike *Speiser v. Randall, supra*, this case does not involve the question whether the First Amendment requires the employer or employee to bear the burden of proving whether the speech is protected or not. Churchill recognizes MDH "has interests as an employer in regulating speech of its employees that differ . . . from those [the state] possesses in connection with regulation of speech of the citizenry in general." *Pickering, supra*, 391 U.S. at 568. Churchill does not contend that MDH was required to give her a full dress adversarial hearing with rights of cross examination. All this Court need decide is whether MDH was required by the First Amendment to employ other than totally "insensitive procedures" to Churchill's interests before terminating her for what she can show and petitioners had "no reason to disbelieve" was protected speech.

MDH's "insensitive procedures" included summary dismissal in the face of reports of speech suggesting policy criticism when Petitioners had "no reason to disbelieve" that the speech was policy criticism of public concern. They included the refusal by Hopper, during the grievance proceeding, to even hear Churchill out when she, groping for what she thought was the speech which got her in trouble, attempted to discuss cross-training and he said he "didn't want to get into that." Pet. App. 76. Cf. R.76E, T.23, pp 411-416. The "insensitive procedures" included a skewed investigation designed to avoid people who could have advised that her speech was on matters of public concern and, therefore, protected. Thus, the Petitioners did more than put the burden on Churchill to show that her speech was likely protected: they foreclosed her any opportunity to do so.

Instead, Churchill suggests that the minimal procedure authorized by this Court to avert erroneous deprivations of property rights in public employment set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), would be sufficient. That means that the obligation on the public employer in a situation such as is presented in this case would be to orally or in writing give notice that the employee is being discharged for having engaged in speech, "an explanation of the employer's evidence, and an opportunity to present [her] side of the story." *Id.*[32]

The Petitioners' assertion (Pet.Brf. pp 22 n.21 and 39) that such a procedure would be futile is not accurate on several counts. First, had Churchill been apprised of the evidence against her, she could not only have advised Petitioners of the subject of her conversation, she could have advised them that Dr. Koch and supervisor Welty heard the speech. She could have brought to Petitioners' attention that Ballew heard very little of the speech and of what she heard she understood less. She could have advised that Ballew's assertion she talked to Graham earlier in the shift and Graham had expressed an interest in transferring to OB, R.76A, T.3, p. 103, was unlikely since Ballew did not arrive at work until 5:00 p.m., two hours after the shift began, R.76D, T.17, p. 94, and at the very time all the other witnesses, including Graham, testified that the conversation occurred. Cf. Welty, R.76E, T.24, pp 33-40; Churchill, R.76D, T.18, pp 289-290; Koch, R.76D, T.19, p. 18; Graham, R.76B, T.6, pp 60-63. She could have pointed out, as it would have been the indication from both Welty and Koch, that it was Graham, not she, who made statements critical of Waters in a personal as

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[32] Thus, Churchill suggests far less than the "adversary hearing" mentioned by this Court in *Board of Regents v. Roth, supra*, 408 U.S. at 574-575 n.14, or the judicial hearing required in the obscenity context by *Freedman v. Maryland, supra*, and its progeny.

opposed to policy sense. She could have advised, as it would have been the indication from Welty, that far from having her "enthusiasm dampened", Graham was still enthusiastic about OB at the end of the shift and, therefore, Ballew's assumption to the contrary was a product of her imagination. R.76E, T.24, pp 192-193. Thus, had some attempt been made to ensure that protected speech would not be punished, Churchill likely could not have been lawfully discharged.[33]

Petitioners argue (Pet. Bf., 36-40) they had no duty to investigate beyond what they had done and that all they were obliged to do was to "establish a 'reasonable belief' " that their actions were justified. There is no issue here of a "duty to investigate". Churchill agrees that if the belief an employer forms supporting its adverse personnel action is "reasonable," an employer has no need to investigate further.

However, the employer's belief that speech is private and unprotected is not reasonable where the reports of speech suggest policy criticism and the employer has "no reason to disbelieve" the speech is protected. In that situation, the employer has a duty to reasonably ensure that the speech is, in fact, unprotected before he takes actions which indiscriminately punish protected and unprotected speech. *Speiser v. Randall, supra; Marcus v. Search Warrant,*

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[33] Some process to ensure that speech is unprotected before an employer takes retaliatory action would ultimately benefit employers. By allowing employees an opportunity to tell their side of the story, employers will be effectively insulated from litigation. Such process would give employees the feeling they had been treated fairly and make it less likely they will leave with the feeling they had been dismissed for having engaged in protected activity. Even if they do leave with that feeling, the employer will have available a documented record showing what the circumstances in fact were and that the discharge was reasonable. Therefore, the process Churchill suggests should discourage, not encourage litigation.

supra; Freedman v. Maryland, supra; Keyishian, supra; Bose, supra; Robel, supra; Elfbrandt, supra.

To hold otherwise would all but eliminate public employee speech and its benefits for the public. *Pickering, supra,* 391 U.S. at 572.[34] Whatever are one's views of the underlying purpose or purposes of the First Amendment, at its heart it

> "has a structural role to play in securing and fostering our Republican system of self-government. Implicit in this structural role is not only 'the principle of that debate on public issue should be uninhibited, robust, and wide open', but also the antecedent assumption that valuable public debates – as well as other specific behavior – *must be informed.*"

Richmond Newspapers v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (emphasis supplied).

The burning issue in OB in January, 1987 and for the preceding six months was the cross-training policy as it affected that department. Supervisor Jean Welty was listening "closely" to learn from Graham how cross-training was received on the general surgical floor. Churchill and Koch stood to be similarly informed. Graham stood to be advised by their perspectives. Thus, each stood to learn from the other, their individual and separate perspectives adding to information – and understanding. Churchill's speech was the exercise of protected speech in its purest, most salutary form.

The means by which ideas become informed and thereby beneficial are by exposure to the "competition of the market." *Abrams v. United States, supra,* 250 U.S. at 630

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[34] It would also afford far less protection to a public employee's First Amendment speech rights than are afforded to employees' rights under Title VII where, pursuant to *McDonald Douglas Corp. v. Green,* 411 U.S. 792 (1973), a plaintiff can carry his burden of persuasion by proof allowing a jury to infer the ultimate fact. Cf. *St. Mary's Honor Center, supra.*

(Holmes, J., dissenting). It would seem that before a public employee, such as the teacher in *Pickering,* goes public with an erroneous factual statement, he/she should endeavor to see that his/her opinions are informed and reflective of the pertinent facts. That "better informed" quality was the very function of the January 16 speech in this case. *Richmond Newspapers, supra,* (Brennan, J., concurring).

Moreover, Churchill using her dinner break to discuss cross-training with two other individuals is suggestive of her public spiritedness – her desire that the public hospital where she worked effectively deliver its public service.[35] If the position urged by the Petitioners in this case were adopted, public employees will be deterred from ever discussing the public policies of the public employer – even on their own time. That would inhibit the refinement and dissemination of the special knowledge possessed by public employees for the ultimate benefit of the public as recognized in *Pickering, supra,* 391 U.S. at 572. Much is at stake in this case.

II.

THE SUMMARY JUDGMENT RECORD SHOWS THAT PETITIONERS HAD NO REASONABLE BASIS FOR CONCLUDING CHURCHILL'S SPEECH WAS "INSUBORDINATE" AND, THEREFORE, NO REASONABLE BASIS FOR BELIEVING THAT IT DID OR COULD HAVE DISRUPTED THE HOSPITAL'S DELIVERY OF HEALTH CARE SERVICES.

A public employer may avoid liability under the First Amendment by satisfying the so called *Pickering* calculus. That calculus includes showing that otherwise protected speech (i) impaired discipline by superiors or harmony

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[35] Thus, unlike *Rankin v. McPherson, supra,* 483 U.S. at 394-401 (Scalia, J., dissenting), there can be no suggestion that Churchill's speech was contrary to the mission of the agency for which she worked.

among co-workers; (ii) had a detrimental impact on close working relationships where necessary; (iii) impeded the performance of the speaker's duties; or (iv) interfered with the regular operation of the enterprise. *Pickering, supra,* 391 U.S. at 570-573. But, in *Pickering,* this Court said the "only way . . . [the public employer] could conclude, absent any evidence of the actual *effect* of the [speech] that the [speech] . . . [was] . . . detrimental . . . was to equate the [individual supervisors'] own interests with that of [the public entity]." *Pickering,* 391 U.S. at 571 (emphasis supplied).[36] Not even Petitioners suggest there is any evidence of actual disruption in this case.

However, the Petitioners have mistakenly seized upon language from *Connick v. Myers, supra,* 461 U.S. at 154, that a public employer need not "tolerate action which he reasonably believes would disrupt the office, undermine his authority, and destroy close working relationships before he takes action." The *Connick* "reasonable belief" test by its own terms applies only when the speech "touch[es] upon matters of public concern in only a most limited sense . . . ", *Connick, supra,* 461 U.S. at 154. That is not the situation in this case where, as far as Petitioners knew, 62% of the speech that motivated them to discharge Churchill was protected.

Specifically, under the *Connick* "reasonable belief" criteria, there is no suggestion that Churchill "personally confront[ed] [her] immediate superior [whereby the hospital's] efficiency may [have been] threatened not only by [her] message but also by the manner, time, and place in which it

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[36] The circuits generally agree that some evidence of the actual effect of the speech is necessary to tip the *Pickering* balance in favor of the employer. *Jungels v. Pierce,* 825 F.2d 1127, 1132 (7th Cir. 1987) (testimony about adverse impact was "speculation and not all of it [was] plausible speculation"); *Flanagan v. Munger,* 890 F.2d 1557, 1566-67 (10th Cir. 1989); *Piesco v. New York,* 933 F.2d 1149, 1159 (2nd Cir. 1991); *Jackson v. Bair,* 851 F.2d 714, 717 (4th Cir. 1988); *Czurlansis v. Alabnese,* 721 F.2d 98, 107 (3rd Cir. 1983).

[was] delivered." *Connick, supra* at 153. Additionally, Churchill's "speech concerning . . . policy [did not arise] from an employment dispute concerning the very application of that policy . . . [to her]." Therefore, the Petitioners had no reason to perceive that Churchill had "threatened the authority of the employer to run the office." *Id.*

Indeed, only Hopper testified Churchill's speech had any adverse effect. He referred to Churchill's statement that Kathy Davis was "ruining the hospital" and said that statement "undermined" the work Davis was doing in the hospital. But, when asked how he knew that, he could only say he "disagree[d]" with the statement. R.76C, T.10, pp 156-160.

That, Churchill respectfully submits, is what this case is all about. Churchill opposed the nurse staffing policy, but did nothing to impede its operation. Had she, for example, precluded or attempted to preclude Graham from working as a cross-trainee or, as Ballew incorrectly assumed, "dampened her enthusiasm", or had her speech interfered with her performance of her duties or anyone else's performance of their duties, the *Pickering* factors on summary judgment might tip in favor of the Petitioners. But, on the record as it must be viewed on summary judgment, those things did not happen. Petitioners had no reasonable basis for assuming it did or could have. *Adickes, supra; Celotex, supra.*

That point is underscored by Justice Powell's concurring statement in *Rankin v. McPherson, supra,* 483 U.S. at 393, that "it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace." The majority in *Rankin* adopted that position, 483 U.S. at 388 n.13. That point applies here with greater force than in *Rankin* because Churchill's speech was consistent with and in furtherance of the mission of her public agency whereas the plaintiff's in *Rankin* was not.

III.

THE INDIVIDUALLY NAMED PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS IT WAS CLEARLY ESTABLISHED IN JANUARY, 1987 THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN ON-PREMISES PRIVATE SPEECH ON THE EMPLOYEE'S OWN TIME ON A MATTER OF PUBLIC CONCERN WHICH DID NOT INTERFERE WITH THE EMPLOYER'S DISCHARGE OF THE PUBLIC FUNCTION AND GAVE RISE TO NO REASONABLE BELIEF THAT IT COULD HAVE.

After *Anderson v. Creighton*, 483 U.S. 635 (1987), a court must determine whether a public official violated clearly established rights in light of the information reasonably available to him. The broad question for qualified immunity purposes is whether it was clearly established in January, 1987 that a public employee, on her own time, had a right to engage in on-premises private speech denoting criticism of the policies of the public employer which the employer had "no reason to disbelieve" was on matters of public concern. That is the level of specificity at which this case must be analyzed, *Anderson v. Creighton, supra*, 483 U.S. at 641, because that is precisely what the Petitioners knew when they fired Churchill. The affirmative answer to that question was given in *Pickering, supra*, in 1968 and in *Givhan v. Western Line Consolidated School District, supra* in 1979.

In addition, a distinguished line of First Amendment cases including *Speiser v. Randall, supra; Elfbrandt v. Russell, supra; United States v. Robel, supra; Freedman v. Maryland, supra; Chicago Teachers v. Hudson, supra; Bose v. Consumers Union, supra;* requiring "sensitive procedures" when the line between protected and unprotected speech is "finely drawn", *Speiser v. Randall, supra,* must be factored into the qualified immunity analysis. Those cases are a corollary to the rule well recognized in public employee speech cases that official action ensure that what is claimed as unprotected speech "actually [falls] within the unprotected category." *Bose, supra,* 466 U.S. at 505; *Rankin v. McPherson, supra,* 483 U.S. at 386, n.9.

Thus, contrary to Petitioners' argument, to say a reasonable public official "could have believed", *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991), that Churchill's speech was unprotected is not sufficient when the rights at stake are those protected by the First Amendment and, *a fortiori*, where the official had "no reason to disbelieve" the speech was protected.[37] *Keyishian v. Board of Regents, supra,* 385 U.S. at 603-604. See also *Marcus v. A Search Warrant, supra; A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); and *Roaden v. Kentucky, supra.* In those circumstances, the question for qualified immunity purposes must be refined to whether a reasonable officer could have failed to believe there was a reasonable probability that Churchill's speech was protected. *Hunter v. Bryant, supra,* 112 S.Ct. at 536. The further question is whether a reasonable public official could have failed to realize that taking summary retaliatory action without knowing the content of the speech beyond that it was critical of hospital policies created an unreasonable risk of punishing protected speech. *Id.; Pickering, supra; Bose, supra; Marcus v. A Search Warrant, supra; Roaden v. Kentucky, supra; Speiser v. Randall, supra.*[38] The negative answer to those questions is

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[37] Churchill does not concede that even in *Hunter v. Bryant* terms a reasonable public official "could have believed" her speech was unprotected.

[38] In their brief at page 45 n.40, the Petitioners argue that the Seventh Circuit ignored its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991). That is inaccurate. *Elliott v. Thomas* involved a plaintiff who had been transferred from a university laboratory for what she claimed was speech criticizing her superior's alleged conflict of interest. But, the university officials were advised only that the conditions in the laboratory had deteriorated because of a bad personnel situation altogether without reference to speech. The officials said they transferred her for that reason. The Seventh Circuit held that the question for qualified immunity purposes was "not what the conditions in the laboratory *were*; it is what the administrators reasonably believed them to have been." 937 F.2d at 343, 344 (emphasis in original). The plaintiff offered "no reason

manifest in light of long established First Amendment doctrine in the area of public employment. *Board of Regents v. Roth, supra; United States v. Robel, supra; Elfbrandt v. Russell, supra; Chicago Teachers, supra.* It is even more manifest in light of the fact that, as noted above, the tenor of the speech upon which Petitioners acted was, more likely than not, policy criticism rather than personal criticism.

IV.

THE HOSPITAL ACTED PURSUANT TO EITHER ITS STATED POLICY OF PERMITTING CRITICAL SPEECH BY EMPLOYEES TO BE DELIVERED ONLY TO SUPERVISORS OR ITS POLICY AS MANIFESTED THROUGH THE ACTION OF ITS ULTIMATE POLICY MAKER, CEO STEPHEN HOPPER.

A.

Hopper As CEO Of MDH Established A Personnel Policy Requiring That Employee Speech Critical Of The Hospital Be Delivered To Supervisors Only.

The "authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority . . . ",

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other than her suspicions to doubt the [university's] account of its [actions]. 937 F.2d at 346.

Petitioners argue that doctrine applies to this case. They say the characterization of Churchill's speech, "negative" and "inappropriate" by Ballew and Graham puts them in the same position as was the university when it heard that conditions had deteriorated and transferred the plaintiff for that reason.

Three fundamental points defeat Petitioners' position. First, they cannot escape that it was Churchill's speech, not deteriorating conditions, or anything else which precipitated her discharge. Second, as far as they knew, her speech was protected as being on a matter of public concern. Third, it was not reasonable for Petitioners to accept Ballew's and Graham's reports as accurately representing Churchill's speech or its effects. See discussion, *supra*, at 12-16, 38-39.

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986); *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1985) (Plurality Opinion). Moreover, "the authority to make municipal policy is necessarily the authority to make *final* policy." *Praprotnik, supra*, 485 U.S. at 127. (Emphasis in original). "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* The "identification of policy making officials is a question of state law." *Id.* at 124.[39]

Pursuant to its authority as conferred in 70 ILCS §910/15-6 and §910/17, the board of directors of McDonough District Hospital enacted Bylaws for the governance of the hospital. R.50, Bylaws, p.12. Article IX of the Bylaws entitled "Administration" directs the board to employ a chief executive officer "who shall be [the board's] direct executive representative in the management of the hospital." R.50, Bylaws, p.12; R.76A, T.2. Additionally, the board has delegated to the CEO "the necessary authority . . . for the administration of the hospital and all its activities and department, subject to only such policies as may be adopted and such orders as may be issued by the

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[39] Applying those principles to hospital districts in Illinois, 70 ILCS §910/15 provides that "a hospital district shall constitute a municipal corporation. . . . " The hospital districts are "governed by a board of nine directors appointed . . . by the presiding officer of the county board with the advice and consent of the county board." 70 ILCS §910/11. Among the powers of the board of directors is the power "to employ or enter into contracts for the employment of any person, firm, or corporation, and for professional services necessary . . . for the accomplishment of the corporate objects of the district. . . . " 70 ILCS §910/15-6. Action of the board of directors of a legislative character "shall be in the form of an ordinance. . . . " 70 ILCS §910/17. "Other action of the board may be by resolution, motion, or other appropriate form, and executive or ministerial duties may be delegated to one or more directors or to an authorized officer . . . of the district." *Id.*

board of directors or by any of its committees. . . . " *Id.* The administrator is further to "be held responsible for the administration of the hospital in all its activities and departments. . . . " *Id.* Further specifying the authority and responsibility of the administrator is §2 of Article IX where, in ¶(D), the Bylaws provide that the administrator is responsible for "selecting, employing, controlling, and discharging employees and developing and maintaining personnel policies and practices for the hospital." *Id.*, T.2.

In the face of what would appear to be explicit legislative and Bylaw authority delegating to the administrator of MDH final authority respecting personnel matters, the Petitioners say it is not so. They claim that legislative authority is reposed in the board and they equate "legislative" authority with policy making authority which they say cannot be delegated.

However, in making that argument the Petitioners have disregarded that this Court has said "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Pembaur, supra*, 475 U.S. at 480. Rather, under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694, there are "other officials 'whose acts or edicts may fairly be said to represent official policy' and whose decisions, therefore, may give rise to municipal liability under §1983." *Pembaur, supra*, 475 U.S. at 480. And, Petitioners overlook that under Illinois law a hospital district "can freely establish its own rules, regulations, and qualifications [for executive personnel policy making authority]" and "Bylaws [can] contain such expressions of purpose. . . . " *Ladenheim v. Union County Hospital District*, 394 N.E.2d 770, 776 (Ill.App.5th, 1979). Petitioners have overlooked that "bylaws are an integral part of the contractual relation between a hospital and the member of its staff", presumably including the CEO of the hospital. *Fahey v. Holy Family Hospital*, 336 N.E.2d 309, 314 (Ill.App.1st 1975).

In unmistakable terms, the board of directors of MDH has delegated to CEO Hopper the full authority not just to

hire and fire but to "develop[] and maintain[] personnel policies and practices for the hospital." R.76A, T.2. Pursuant to that authority, Hopper created some personnel policies. R.76A, T.1, p.6. Among the policies is a policy "to respect the individual employee's rights and assure employees of their right to freely discuss with supervision any matter concerning their own or the hospital's welfare." *Id.*, No. 9. That policy was construed by Hopper and by the vice president for personnel, Bernice Magin, to restrict employee criticism of hospital policies to that delivered to the supervisors. Magin was explicit when, in responding to questions concerning employee criticism delivered to fellow employees, she said

> "I would prefer that [the employee] bring the matter directly to my attention. That's what we encourage employees to do is go to their supervisor."

R.143, T.E, p. 71. Magin then said that if the same employee persisted in failing to bring the matter to the supervisor that "it would . . . be negative behavior." R.143, T.E, p. 80.[40]

Hopper was equally if not more explicit. After answering that the only thing wrong with Churchill's speech to the extent she said Kathy Davis was "ruining the hospital" was that he "[d]isagreed" with it, said, "she [was] voicing it to the wrong forum." R.76C, T.10, p. 158. He said that she should have voiced it to the supervisors, "Cindy Waters, Kathy Davis, or myself." *Id.*

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[40] Consistently with their practice of drawing all inferences in their favor, Petitioners indicate at page 48 that "Magin's comments . . . indicate only that hospital managers . . . might become upset if employees went over their heads or criticized them personally. . . . " That is not what Magin said. *A fortiori*, it is not what she should be construed as having said on summary judgment, drawing all inferences in favor of Churchill.

Likewise, in their brief at p. 48, n.42, Petitioners advise of employers' "open door" policies. Churchill certainly has no objection to "open door" policies. However, they should not be construed so as to preclude the type of discussion involved in this case among co-employees on their meal breaks.

B.

Hopper's Participation In The Discharge Decision And His Ratification Of That Decision Constitute Hospital Policy As The Final Act Of The Highest Hospital Authority.

Assuming a fact finder were to find that a policy restricting employee speech critical of the policies of the hospital to only supervisors did not exist, the fact that Hopper participated at two levels of Churchill's discharge, the discharge decision and the grievance proceeding demonstrates that her discharge was the official policy of the hospital district. *Pembaur v. City of Cincinnati, supra,* 475 U.S. at 479-481. Importantly, that was Hopper's understanding as well. He said the board would not have the power, under the current delegation to him of final authority in personnel matters, "to override [his decision]." R.76C, T.11, p. 31. Rather, "[his] decision is final." *Id.*

V. CONCLUSION

For the reasons above stated, the judgment of the court of appeals should be affirmed.

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